SCC Court File No. 39597

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA)

BETWEEN:

PERPETUAL ENERGY INC., PERPETUAL OPERATING TRUST and PERPETUAL OPERATING CORP.

APPLICANTS
(Appellants/Respondents)

- and -

PRICEWATERHOUSECOOPERS INC., LIT, in its capacity as the TRUSTEE IN BANKRUPTCY OF SEQUOIA RESOURCES CORP. and not in its personal capacity

RESPONDENT
(Respondent/Appellant)

REPLY
OF PERPETUAL ENERGY INC., PERPETUAL OPERATING TRUST and PERPETUAL OPERATING CORP.

Pursuant to Rule 28 of the *Rules of the Supreme Court of Canada*

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NATIONAL IMPORTANCE

A. The *BIA* Claim: the Trustee demonstrates how the Court of Appeal has rendered the presumption in s. 4(5) of the *BIA* meaningless

1. When Parliament amended s. 4(5) of the *BIA* in 2007 to make the presumption of non-arm's length dealing between related persons rebuttable "for the purpose of" s. 96 of the *BIA*, Parliament must have intended *something*.

2. In deciding whether the related parties to the Asset Transaction were nonetheless at arm's length, the Court of Appeal declined to follow the decisions of this Court and the Federal Court to consider all the circumstances, including whether the transaction was a step in a multi-step transaction between arm's length parties.[1] Specifically, the Court of Appeal rejected the submission that the Chambers Judge's finding that negotiation of the Aggregate Transaction and the Asset Transaction between arm's length parties—the Purchaser Team and the Vendor Team—rebutted the presumption that the Asset Transaction was non-arm's length. In so doing, the Court made it effectively impossible for related persons to rebut the presumption even when "all aspects" of the transaction are negotiated by "a sophisticated arm's length party," "with the assistance of experienced legal counsel."[2]

3. In its response to this Court, the Trustee submitted that "the Perpetual Defendants had deliberately made no effort to rebut the presumption that POT and PEOC were not at arm's length during the negotiations, *by showing that the Asset Transaction was a transfer at fair value*."[3] The Trustee twice repeated this interpretation of the *BIA* in its conclusion section of its submissions to this Court, stating that the presumption in s. 4(5) can be rebutted "by showing that the transfer took place at fair value," and "by providing evidence that the bankrupt received fair value consideration in the transfer, consistent with arm's length dealing."[4]

4. The Trustee's interpretation highlights how the Court of Appeal made the rebuttable presumption in s. 4(5) of the *BIA* meaningless for claims made under ss. 95 and 96 of the *BIA*.[5] A

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[1] Perpetual Entities' Memorandum of Argument at paras 33-43, citing *McLarty* and *Teleglobe*.
[2] QB Reasons at para 314.
[3] Trustee's Response Memorandum of Argument at para 15 (emphasis added).
[4] Trustee's Response Memorandum of Argument at paras 70.3-70.4.
[5] *BIA*, s. 4(5).

trustee in bankruptcy must separately prove as part of a s. 96 claim that the transfer was at non-arm's length and that the transfer was at undervalue.[6] If the only way for a related party to rebut the presumption under s. 4(5) of the *BIA* is by disproving the transfer at undervalue element of s. 96(1), then the rebuttable presumption under s. 4(5) has no effect—it is entirely subsumed within the "transfer at undervalue" element of a s. 96 claim.

5. The Chambers Judge held that the *BIA* cannot support the Trustee's interpretation, stating: "section 4(5) of the *BIA* provides a foundation by which to rebut the application of section 96 of the *BIA* independent of proof of fair market value".[7] But the Court of Appeal's decision, as the Trustee's submissions suggest, demonstrates that even when "all aspects" of a transaction are negotiated at arm's length, evidence of value is also required to rebut the presumption.

6. That cannot be the test Parliament intended when it created separate elements for "transfer at undervalue" and for "arm's length", and when it specifically legislated that the latter could be rebutted. It must be possible to rebut the s. 4(5) presumption without disproving the transfer at undervalue element. This Court's intervention is necessary to clarify the interpretation of this important federal legislation of wide application.

B. The Oppression Claim: the Trustee's submissions demonstrate the absurdity of permitting a bankruptcy trustee to seek a $217 million claim for a $1.5 million alleged oppression

7. While the Trustee asserts that it is trite law that a bankruptcy trustee can pursue an oppression claim "on behalf of creditors affected by an oppressive, related-party transaction that also harmed the bankrupt corporation,"[8] the Trustee's submissions demonstrate how the Court of Appeal's interpretation of the oppression remedy is inconsistent with existing principles.

8. The Court of Appeal stated that it granted leave to the Trustee to pursue the Oppression Claim "on behalf of all other creditors who were owed money at the time of the alleged oppressive conduct, and remained unpaid on the date of bankruptcy."[9] Only three municipalities owed a total

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[6] *BIA*, s. 96(1).
[7] QB Reasons at para 111.
[8] Trustee's Response Memorandum of Argument at para 70.6.
[9] Appeal Reasons at para 140.

of $1.5 million fit this category.[10] The Trustee notionally acknowledges that it can only bring the Oppression Claim "on behalf of the creditors affected by the Asset Transaction."[11]

9. But the Trustee states any recovery would not be for the benefit of the three creditors allegedly affected and on whose behalf the claim is brought. Instead, the Oppression Claim is to "benefit all of the creditors [at the time of the bankruptcy] equally"[12] including by "requiring the Defendants to repay into the Estate the difference between the fair market consideration and the consideration actually received by Sequoia,"[13] which the Trustee says is $217 million.[14]

10. The Trustee's submissions highlight three issues of national importance.

11. First, when, if at all, should a bankruptcy trustee be able to prosecute an oppression claim belonging to a select few creditors? If so, why? The Trustee does not say. It is contrary to the cases cited by both parties that a bankruptcy trustee can only bring a claim for harm suffered by *all* creditors or the creditors as a whole,[15] and, in any event, has no purpose where the municipalities could bring their own oppression claims.

12. Second, why should any creditors in bankruptcy—who were not creditors at the time of the alleged oppression—obtain any benefit at all? It has historically been trite law that only those who were creditors at the time of the alleged oppression can be oppressed.[16] While the Trustee acknowledges "the principle that an oppression claim can never be advanced *ex post facto* on behalf of a party who was not a stakeholder at the time of the oppressive conduct,"[17] if recovery is permitted by the Trustee in this case, that law is called into question. Any recovery "*to the Estate*"[18] is a windfall for the creditors of the bankrupt estate—they became creditors of Sequoia sometime

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[10] QB Reasons at para 334: Rose Affidavit at para 70.
[11] Trustee's Response Memorandum of Argument at para 65.
[12] Trustee's Response Memorandum of Argument at para 53
[13] Trustee's Response Memorandum of Argument at para 65.
[14] QB Reasons at paras 3, 336, 368.
[15] See Perpetual Entities' Memorandum of Argument at paras 57-60.
[16] *Pillar Sausages & Delicatessens Ltd v Cobb International Corp* (2003), 35 BLR 3d 193 at para 14 (Ont SCJ), aff'd by (2003), 40 BLR (3d 88 (Ont CA); *Glasvan Great Dane Sales Inc v Qureshi* (2003), 35 BLR (3d) 217 at paras 32-33 (Ont SCJ) aff'd by (2005), 3 BLR (4th) 317 (Ont CA).
[17] Trustee's Response Memorandum of Argument at para 19.
[18] Trustee's Response Memorandum of Argument at para 53 (emphasis in original).

during the 18 months between the alleged oppression and the bankruptcy.[19] Further, any recovery is prejudicial to the three municipalities who must share rateably with non-oppressed creditors.

13. Third, how can a bankruptcy trustee seek a monetary remedy for more than the amount the three municipalities suffered by the alleged oppression? It is trite law that any order "should go no further than necessary to rectify the oppression."[20] The three municipalities allegedly oppressed by the Asset Transaction were owed at most $1.5 million. Yet the Trustee is "not 'seeking to recover damages' for the 'unpaid property taxes owed to three municipalities'," but that the Defendants "repay the [alleged $217 million] shortfall in consideration received by PEOC."[21]

14. Further, while the Court of Appeal acknowledged that "the oppression claim may be narrower than the Trustee in Bankruptcy anticipated,"[22] the Trustee's submissions to this Court confirm that it is not seeking a narrower remedy but $217 million.[23] The Trustee seeks to distance itself from the Court of Appeal's conclusion because it exposes the fundamental flaw in its reasoning: permitting a bankruptcy trustee to seek an oppression claim on behalf of three creditors allegedly owed $1.5 million is not a claim that a bankruptcy trustee can justify to bring under the *BIA* or the oppression remedy to "benefit all of Sequoia's creditors"[24] in bankruptcy.

15. This Court's intervention is necessary to address this important issue at the intersection of two statutes (or their equivalents), which apply across Canada.

CLARIFICATION OF THE FACTS

16. The Trustee's submissions rely on the Court of Appeal stating that "there was no evidence on this record of any equivalent arm's-length negotiation of the consideration that was set in the Asset Transaction for the transfer of the Goodyear Assets."[25]

17. The Chambers Judge's findings of fact were opposite: "198Co was a sophisticated arm's length party. It negotiated all aspects of the Aggregate Transaction with the assistance of

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[19] QB Reasons at paras 205-210, 238; Rose Affidavit at paras 64-76.
[20] *Wilson v Alharayeri*, 2017 SCC 39 at para 54.
[21] Trustee's Response Memorandum of Argument at para 54.
[22] CA Reasons at para 144.
[23] Trustee's Response Memorandum of Argument at paras 54, 64-65.
[24] Trustee's Response Memorandum of Argument at paras 53, 65.
[25] Appeal Reasons at para 108 (emphasis in original).

experienced legal counsel."[26] The Court of Appeal concurred.[27] The Chambers Judge also found: "Separate teams and their respective counsel represented each of the Perpetual Energy group and the Kailas Capital group in the negotiations concerning the Aggregate Transaction (as a whole) and the Asset Purchase Agreement (on its own)."[28]

18. There was uncontradicted evidence for the Chambers Judge's findings that an arm's length party negotiated "all aspects" of the "Asset Purchase Agreement (on its own),"[29] including specific evidence of negotiation of the consideration of the Asset Transaction: "The Purchaser Team and the Vendor Team negotiated key terms of the Asset Purchase Agreement which included: (a) PEOC paid POT a purchase price of $10…"[30] Further, the Purchaser Team directed the purchase structure from the outset,[31] the exact form of the Asset Purchase Agreement was a schedule to the Share Purchase Agreement,[32] and "The Asset Transaction was entirely negotiated… [by] the Purchaser Team on behalf of PEOC", who "negotiated the commercial terms and all other aspects of the Asset Purchase Agreement on behalf of PEOC, including which assets would comprise the Goodyear Assets, and the terms of the statement of adjustments."[33] The other evidence of value is the Share Transaction, which closed two minutes after the Asset Transaction and independently determined the fair market value of PEOC and therefore the Goodyear Assets, net of adjustments.[34] On the evidence, the Court of Appeal's finding was unsupportable.

Respectfully submitted this 25th day of May, 2021

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[26] QB Reasons at para 314.
[27] Appeal Reasons at para 99.
[28] QB Reasons at para 57.
[29] Rose Affidavit at paras 18-19, 21, 23, 30-40, 44-46, 54.
[30] Rose Affidavit at para 48(a). See also Rose Affidavit at paras 48-49.
[31] Rose Affidavit, Exhibit E.
[32] Rose Affidavit at paras 42, 53; Exhibit H.
[33] Rose Affidavit at paras 46, 54.
[34] Rose Affidavit at paras 45, 54-55; Exhibit K.

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Statutory Provisions

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